Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Inmarsat Group Holdings Limited	)	IB Docket No. 04-439
	)	
Petition for Declaratory Ruling Pursuant to Section 621(5)(F) of the ORBIT Act	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 2005 **Released: June 14, 2005**

By the Commission:

I. INTRODUCTION

1. In this Order, we find that Inmarsat Group Holdings Limited (together with its subsidiaries, "Inmarsat") is in compliance with the Certification it submitted to the Commission[1] pursuant to Section 621(5)(F) of the ORBIT Act,[2] and therefore has met the objectives of 621(5) of the ORBIT Act.[3] The Commission has previously found that Inmarsat has met its obligations to achieve a pro-competitive privatization under other criteria in Sections 621 and 622 of the ORBIT Act.[4] In this Order, we also find that the provisions relating to additional services under Section 602 of the ORBIT Act are no longer

[1] Request for Declaratory Ruling, filed Nov. 15, 2004, and Supplemental Submission, filed Dec 17, 2004, IB Docket No. 04-439.

[2] Open-Market Reorganization for the Betterment of International Telecommunications Act, Pub. L. No. 106-180, 114 Stat. 48 (2000), *as amended*, Pub. L. No. 107-233, 116 Stat. 1480 (2002), *as amended* Pub. L. No. 108-228, 118 Stat. 644 (2004), *as amended,* Pub. L. No. 108-371, 118 Stat. 1752 (2004). The ORBIT Act amended the Satellite Communications Act of 1962, 47 U.S.C. § 701 *et seq*. (Satellite Act) and is codified *at* 47 U.S.C. § 761 *et seq*. For the sake of convenience, in this Order, the term "ORBIT Act" and the citations to statutory section numbers refer to the Satellite Act, as amended by the ORBIT Act. The term "ORBIT Act, as amended" refers to the provisions added by the most recent amendment to the ORBIT Act, Pub. L. No. 108-371, 118 Stat. 1752 (2004), signed into law on October 25, 2004, adding new subsections (F) and (G) to Section 621(5), which provide an alternative method for compliance with the privatization requirements of Section 621(5) of the ORBIT Act. *See* ORBIT Act, as amended, §§ 621(5)(F), 621(5)(G).

[3] ORBIT Act, §§ 621(5)(A) and (B).

[4] ORBIT Act, §§ 621 and 622. *See also Comsat Corporation et. al.,* Memorandum Opinion, Order and Authorization, 16 FCC Rcd 21661 (2001) ("*Inmarsat Market Access Order"*).

applicable to Inmarsat,[5] and that the effective date for purposes of Section 645(3) of the ORBIT Act is the effective date of this Order.[6]

II. BACKGROUND

2. In March 2000, Congress passed the ORBIT Act to "promote competition in the provision of satellite communications services" through the pro-competitive privatization of former intergovernmental organizations ("IGOs"), Inmarsat and INTELSAT.[7] The ORBIT Act requires, among other things, that the Commission make a determination as to whether Inmarsat's privatization is pro-competitive and specifies the criteria that the Commission is to use for making this determination. The ORBIT Act sets out detailed criteria in Sections 621 and 622, which set a standard to ensure a pro-competitive environment in the telecommunications markets of the United States. The criteria include:

- privatization from an IGO to a non-IGO status within a specified timeframe;[8]
- termination of privileges and immunities that Inmarsat had as an IGO;[9]
- incorporation in a country that is a Signatory to the World Trade Organization ("WTO") Basic Telecommunications Agreement and that has effective laws and regulations that secure competition in telecommunications services;[10]
- conversion to a stock corporation with a fiduciary board of directors;[11]
- limitations on interlocking officers, directors, or employees shared with any IGO or any Signatory or former Signatory of Inmarsat;[12]
- an arms-length relationship between and among Inmarsat and any separated entities or INTELSAT;[13] and
- conduct of an initial public offering of securities that achieves substantial dilution of the aggregate ownership of former Signatories of Inmarsat after privatization;[14]

Until Inmarsat is privatized consistent with the requirements of the ORBIT Act, the ORBIT Act states that

[5] ORBIT Act, § 602 (a). Under the ORBIT Act, the term "additional services" for Inmarsat are defined as "non-maritime or non-aeronautical mobile services in the 1.5 and 1.6 Ghz band on planned satellites or the 2 Ghz band." ORBIT Act, § 681(a)(12)(A).

[6] ORBIT Act, § 645(3).

[7] International Telecommunications Satellite Organization ("INTELSAT") and Inmarsat were originally intergovernmental organizations created by international agreements as a result of early initiatives to develop space technology.

[8] ORBIT Act, § 621(1)(A).

[9] ORBIT Act, § 621(3).

[10] ORBIT Act, § 621(7).

[11] ORBIT Act, § 621(5)(D).

[12] ORBIT Act, § 621(5)(C).

[13] ORBIT Act, § 621(5)(E).

[14] ORBIT Act, §§ 621(2) and 621(5)(A).

Inmarsat "shall not be permitted to provide additional services" and the "United States shall oppose and decline to facilitate applications by [Inmarsat] for new orbital locations to provide such services."[15]

3. In October 2001, the Commission determined that Inmarsat had privatized in a manner consistent with most – but not all – of the privatization criteria of the ORBIT Act.[16] Specifically, the Commission found that, although the privatized Inmarsat had satisfied the non-IPO criteria of the ORBIT Act, it had not yet conducted an initial public offering of securities, as mandated by the Act.[17] Despite this finding, the Commission observed that it had previously determined that the ORBIT Act permitted authorization of certain services by successor entities of former intergovernmental organizations, such as Inmarsat, prior to the conduct of an IPO.[18] Accordingly, the Commission authorized several entities to use the space segment of the privatized Inmarsat for communications services to, from, or within the United States.[19] This authority was conditioned, however, on a future Commission finding that the privatized Inmarsat has conducted an IPO as required by the ORBIT Act.[20] Furthermore, the Commission explicitly stated that the authorizations for non-core services[21] would be limited, or revoked entirely, should the privatized Inmarsat fail to conduct an IPO in compliance with the requirements of the ORBIT Act.[22] The Commission also directed the privatized Inmarsat to file with the Commission, within 30 days after conduct of its IPO, a demonstration that the IPO is in compliance with the ORBIT Act.[23]

[15] ORBIT Act, §§ 602(a) and (b).

[16] *Inmarsat Market Access Order,* 16 FCC Rcd at 21661 (paras. 109-110).

[17] *Inmarsat Market Access Order*, 16 FCC Rcd at 21711 (para. 109).

[18] *Inmarsat Market Access Order*, 16 FCC Rcd at 21683-84 (para. 37), citing *INTELSAT LLC,* Memorandum Opinion Order and Authorization, 16 FCC Rcd 12280, 12288 (paras. 23-24) (2001), relying on ORBIT Act, § 601(b)(1)(D).

[19] These entities were Comsat Corporation, Stratos Mobile Networks, LLC, SITA Information Computing Canada, Inc., Honeywell, Inc., Marisat Communications Network, Inc., and Deere & Company. *See Inmarsat Market Access Order*, 16 FCC Rcd at 21668 (para. 1).

[20] *Inmarsat Market Access Order*, 16 FCC Rcd at 21712 (para. 110) ("IT IS FURTHER ORDERED that the authorizations issued herein are subject to a future Commission finding that Inmarsat has conducted an IPO under Sections 621(2) and 621 (5)(A)(ii) of the ORBIT Act").

[21] Under the ORBIT Act, "non-core" services for Inmarsat are services other than global maritime distress and safety services or other existing maritime or aeronautical services for which there are not alternative providers. ORBIT Act, § 681(a)(11).

[22] *Inmarsat Market Access Order*, 16 FCC Rcd at 21712 (para. 112) ("IT IS FURTHER ORDERED that the authorizations for non-core services issued herein are subject to limitation or revocation pursuant to Section 601(b)(1) of the ORBIT Act and Title III of the Communications Act of 1934, 47 U.S.C. 301 et seq., should Inmarsat fail to conduct an IPO in compliance with the requirements of Section 621 of the ORBIT Act").

[23] *Inmarsat Market Access Order*, 16 FCC Rcd at 21712 (para. 111).

4. On February 10, 2004, Inmarsat notified the Commission of two transactions that it claimed satisfied its remaining ORBIT Act IPO requirement.[24] These transactions were: (1) a private equity transaction, by which a majority of the equity interest in Inmarsat was sold to private investment funds advised by Apax Partners[25] and Permira,[26] and (2) an offering of debt that would be listed on the Luxembourg Stock Exchange.[27] The Commission placed Inmarsat's filing on Public Notice on March 5, 2004.[28] Several parties filed comments in response to this Public Notice.[29]

5. Subsequent to Inmarsat's notification of the two transactions, Congress amended Section 621(5) of the ORBIT Act in October of 2004 to add, as an alternative to conducting an IPO and public securities listing, a certification process that permits Inmarsat to certify, and the Commission to determine, that certain financial and control interests by Signatories and former Signatories, and certain ownership interests by IGOs, no longer exist in Inmarsat.[30] Generally, the amendment provides that Inmarsat may be deemed a national corporation and may forgo an IPO and public securities listing and still achieve the purposes of Section 621(5), if it certifies to the Commission that certain financial, control and ownership requirements have been met with respect to interests of Signatories, former Signatories and IGOs, and if the Commission, after notice and comment, determines that Inmarsat is in compliance with such Certification.[31]

[24] Letter from Alan Auckenthaler, Inmarsat, to Ms. Marlene H. Dortch, Secretary, FCC, File No. SAT-MSC-20040210-00027 (filed Feb. 10, 2004) ("*February 10 Inmarsat Letter"*).

[25] Inmarsat describes Apax Partners as "a leading advisor of private equity funds in the United Kingdom, United States, and Western Europe," which includes Apax PartnersWorldwide LLP, Apax Partners Europe Managers Ltd., Apax Partners, Inc., and Apax Partners Holdings Ltd. *See February 10 Inmarsat Letter* at 2.

[26] Permira is described by Inmarsat as "a leading European private equity firm," which includes Permira Advisers Limited and various other entities which act as advisors and consultants to the Permira funds. *See February 10 Inmarsat Letter* at 2-3.

[27] *February 10 Inmarsat Letter* at 4.

[28] Public Notice, Policy Branch Information, Report No. SAT-0019 (Mar. 5, 2004).

[29] A list of parties filing pleadings in response to the Public Notice is attached as Appendix A. These pleadings were filed under File No. SAT-MSC-20040210-00027 and have been incorporated into IB Docket No. 04-439.

[30] ORBIT Act, as amended, §§ 621(5)(F) and (G).

[31] ORBIT Act, as amended, § 621(5)(F).

6. Inmarsat certified to the Commission on November 15, 2004, that it had fulfilled the amended privatization requirements of Section 621(5) of the ORBIT Act, and it petitioned the Commission to determine that its certification complied with the remaining privatization criterion of the ORBIT Act.[32] On December 16, 2004, Inmarsat supplemented its Request for Declaratory Ruling with additional information about the ownership interests of the intergovernmental organization, the International Mobile Satellite Organization (IMSO), in Inmarsat ("Supplemental Submission").[33] The Commission placed Inmarsat's Request for Declaratory Ruling, together with its Supplemental Submission, on Public Notice on December 21, 2004.[34] Several parties filed comments in response to the Public Notice.[35]

III. DISCUSSION

7. The recent amendment to Section 621(5) of the ORBIT Act, provides the following:

> (F) Notwithstanding subparagraphs (A) and (B), a successor entity may be deemed a national corporation and may forgo an initial public offering and public securities listing and still achieve the purposes of this section if –
>
> (i) the successor entity certifies to the Commission that –
>
> (I) the successor entity has achieved substantial dilution of the aggregate amount of signatory or former signatory financial interest in such entity;
>
> (II) any signatories and former signatories that retain a financial interest in such successor entity do not possess, together or individually, effective control of such successor entity; and
>
> (III) no intergovernmental organization has . . . more than a minimal ownership interest in a successor entity of Inmarsat;
>
> (ii) the successor entity provides such financial and other information to the Commission as the Commission may require to verify such certification.
>
> (iii) the Commission determines, after notice and comment, that the successor entity

[32] Request for Declaratory Ruling, IB Docket No. 04-439 (filed Nov. 15, 2004).

[33] Supplemental Submission, IB Docket No. 04-439 (filed Dec. 16, 2004).

[34] Public Notice, "Inmarsat Group Holdings Limited Files Certification and Petition for Declaratory Ruling Pursuant to Section 621(5)(F) of the Open-Market Reorganization for the Betterment of International Telecommunications Act, as amended (the "ORBIT Act")," DA 04-4011 (Dec. 21, 2004).

[35] A list of parties filing pleadings in response to the Public Notice is attached as an Appendix to this Order. Iridium Satellite, LLC ("Iridium") filed reply comments in response to Inmarsat's Request for Declaratory Ruling, in which Iridium urges the Commission to ensure that incumbent U.S. licensees are protected from harmful interference from any new services offered by Inmarsat as a result of its provision of mobile-satellite services in the United States. *See* Iridium Reply Comments at 2. Because the concerns raised by Iridium are not germane to our analysis of Inmarsat's compliance with the privatization provisions of the ORBIT Act, we will not consider Iridium's comments as part of this proceeding. This action is without prejudice to Iridium submitting such concerns about interference to its system in response to any earth station application to access the Inmarsat space segment, or petitioning for a rulemaking on this subject.

is in compliance with such certification

> (G) For purposes of subparagraph (F), the term 'substantial dilution' means that a majority of the financial interests in the successor entity is no longer held or controlled, directly or indirectly, by signatories or former signatories.[36]

8. Inmarsat submitted a Certification, executed on December 16, 2004, by Andrew Sukawaty, Chairman and Chief Executive Officer of Inmarsat, that certifies as to the financial, control, and ownership interests held in Inmarsat, as required under Section 621(5)(F)(i) of the ORBIT Act.[37] Specifically, Inmarsat certifies, as required under Section 621(5)(F)(i)(I), that "Inmarsat has achieved substantial dilution of the aggregate amount of former signatory financial interest in Inmarsat."[38] Inmarsat further certifies, pursuant to Section 621(5)(F)(i)(II), that "[a]ny signatories or former signatories that retain a financial interest in Inmarsat do not possess, together or individually, effective control of Inmarsat."[39] These provisions concern the continued financial interests in, and continued control over, the privatized Inmarsat by signatories and former signatories of Inmarsat. Inmarsat also certifies, as required under Section 621(5)(F)(i)(III), that "[n]o intergovernmental organization has more than a minimal ownership interest in Inmarsat."[40] This provision concerns the nature of any IGO ownership interests in Inmarsat. Inmarsat's Certification states, under penalty of perjury, that the representations contained in the Certification, the Petition for Declaratory Ruling, and the Supplemental Submission are true and correct.[41]

9. To verify its Certification, Inmarsat relies on ownership and financial information that was submitted with its Certification, as supplemented. This information specifically includes: (1) Inmarsat Capitalization and Corporate Structure;[42] (2) identification of Inmarsat Shareholders;[43] (3) historical transfers of Inmarsat shares since privatization in April of 1999;[44] (4) a list of Inmarsat subordinated preference certificates ("SPC") Holders;[45] (5) a copy of the Inmarsat Shareholders' Agreement;[46] and (6)

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[36] ORBIT Act, as amended, §§ 621(5)(F), 621(5)(G).

[37] The Certification was first executed on November 15, 2004. *See* "Certification of Inmarsat Group Holdings Limited" attached to the Request for Declaratory Ruling. Inmarsat re-executed the Certification on December 16, 2004, as part of its Supplemental Submission (*"December 16 Sukawaty Certification"*).

[38] *December 16 Sukawaty Certification*.

[39] *December 16 Sukawaty Certification*.

[40] *December 16 Sukawaty Certification*.

[41] *December 16 Sukawaty Certification*.

[42] Request for Declaratory Ruling, Attachment A.

[43] Request for Declaratory Ruling, Attachment B.

[44] Request for Declaratory Ruling, Attachment C.

[45] Request for Declaratory Ruling, Attachment D.

[46] Request for Declaratory Ruling, Attachment E.

the Articles of Association of Inmarsat Group Holdings Ltd.[47]

10. Upon review of this information, and after notice and comment, we determine that Inmarsat is in compliance with the certification requirements set forth under Section 621(5)(F) of the amended ORBIT Act. We address each of these requirements and Inmarsat's certifications thereto below.

A. Section 621(5)(F)(i)(I): "Substantial Dilution"

11. In order to take advantage of the alternative certification provisions of the amended ORBIT Act, Inmarsat must first certify that it "has achieved substantial dilution of the aggregate amount of signatory or former signatory financial interest in such entity."[48] The term "substantial dilution" is defined by the amended ORBIT Act to mean, for the purposes of this subparagraph, that "a majority of the financial interests in the successor entity is no longer held or controlled, directly or indirectly, by signatories or former signatories."[49] Inmarsat has certified that it had achieved such substantial dilution as part of the *December 16 Sukawaty Certification* that was attached to Inmarsat's Supplemental Submission.

12. We find that Inmarsat complies with this certification. Inmarsat provides information that demonstrates that approximately 57.46% of the ownership of Inmarsat is now held by non-Signatory shareholders.[50] At the time of Inmarsat's filing, the record shows that 25.87% of the equity in Inmarsat was held by funds advised by Apax Partners; another 25.87% was held by Permira; 5.70% by current or previous Inmarsat directors, officers, and employees (as well as an employee benefit trust); and 0.01% by other former directors and current employees of Inmarsat not included in the previous category.[51] Neither Apax Partners nor Permira are former Signatories of Inmarsat, and there is nothing in the record to indicate that these entities are owned or controlled, either directly or indirectly, by Signatories or former Signatories.[52]

13. Although the term "financial interest" is not defined by the amended ORBIT Act,[53] we find that the interests of former Signatories have been substantially diluted even if the term is defined to include debt interests. Inmarsat reports that its debt interests can be divided into three broad categories: (1) subordinated preference certificates ("SPCs"); (2) debt held by private banks; and (3) debt incurred

[47] Request for Declaratory Ruling, Attachment F.

[48] ORBIT Act, as amended, § 621(5)(F)(i)(I).

[49] ORBIT Act, as amended, § 621(5)(G).

[50] Request for Declaratory Ruling at 4.

[51] Request for Declaratory Ruling at 4 and Appendix B. At the time of filing, Inmarsat had 27,000,000 total issued shares. Of this amount, Apax Partners held 6,985,960 shares (25.8739259%); Permira held 6,985,960 shares (25.8739259%); current or previous Inmarsat directors, officers, employees and employee benefit trust held 1,539,000 (5.700%); and other Inmarsat employees and former directors held 2,264 shares (0.0083852%). *See* Request for Declaratory Ruling, Appendix B.

[52] To the contrary, Inmarsat expressly states that, "No former Signatory of Inmarsat is an investor in the funds advised by Apax Partners or the funds advised by Permira that own shares in Inmarsat Group Holdings." Request for Declaratory Ruling at 7, n.22.

[53] Request for Declaratory Ruling at 5.

through issuance of bonds.[54] Inmarsat states that the SPCs are "stapled" to its Class B ordinary shares and cannot be transferred apart from these shares.[55] Inmarsat asserts that non-Signatories hold these SPCs in roughly the same percentage that they hold equity interests in Inmarsat; that is, a majority (54.89%) of the SPCs is owned by non-Signatories.[56] Inmarsat also states that 100% of its bank debt is held by institutional entities that are non-Signatories, and that, "to the best of its knowledge," all of its bonds are held by institutional entities who are non-Signatories.[57] Therefore, based on the record before us, we find that the financial interests of former Signatories in Inmarsat have been substantially diluted.

B. Section 621(5)(F)(i)(II): "Effective Control"

14. The second element of the alternative certification provisions of the amended ORBIT Act requires Inmarsat to certify that "any signatories and former signatories that retain a financial interest in such successor entity do not possess, together or individually, effective control of such successor entity."[58] In its Request for Declaratory Ruling and *December 16 Sukawaty Certification*, Inmarsat acknowledges that former Signatories retain a financial interest in the company, but certifies that these former Signatories do not possess, together or individually, effective control of Inmarsat.[59] For the reasons below, we find that Inmarsat is in compliance with its certification.

15. The record shows that, as a result of Inmarsat's private equity placement and debt offering, only three former Signatories retain ownership interests in excess of five percent of the privatized Inmarsat: Telenor (14.95%); COMSAT (13.96%); and KDDI (7.55%).[60] Twelve other former Signatories hold interests less than five percent each, which in the aggregate amount to 6.08%.[61] Taken

[54] Request for Declaratory Ruling at 5.

[55] Request for Declaratory Ruling at 5.

[56] Request for Declaratory Ruling at 5-6 and Appendix D. Inmarsat explains that non-Signatories hold a smaller percentage of SPCs than their percentage holdings of equity because certain non-Signatories hold only Class A shares that do not provide any ownership of SPCs. *See id.* at 6, n.19.

[57] Request for Declaratory Ruling at 5-6. Inmarsat notes that, although all of Inmarsat's bonds were initially placed with non-Signatory institutional investors, its bonds are publicly traded and it is not possible to ascertain definitively who holds all of the bonds at any given time. *See id.*, n.20. Even if all the bonds were eventually acquired by former Signatories, Inmarsat states that more than 50% of the total capital (either equity alone or debt and equity) of Inmarsat would still be held by non-Signatories. *Id.*

[58] ORBIT Act, as amended, § 621(5)(F)(i)(II).

[59] *December 16 Sukawaty Certification*.

[60] Request for Declaratory Ruling at 8. Although parties have challenged the treatment of COMSAT as a former Signatory due to the privatization and subsequent sale of COMSAT to private entities, *see, e.g.,* Comments of Lockheed Martin at 3, we believe that the plain language of the ORBIT Act requires us to treat the interest of COMSAT as a former Signatory for the purposes of review under the ORBIT Act. *See* ORBIT Act, §§ 642(b)(1) (stating that COMSAT is an Inmarsat Signatory) and 681(18) (defining the term "COMSAT" as "the corporation established pursuant to title III of the Communications Satellite Act of 1962 (47 U.S.C. 731 et seq.) or the successor in interest to such corporation"). As detailed in this Order, Inmarsat has achieved independence even treating COMSAT as a former Signatory. If COMSAT were not treated as a former Signatory, it would only strengthen the conclusion that Inmarsat has achieved independence from its former Signatories.

[61] Request for Declaratory Ruling at 7.

together, the total ownership interest of all former Signatories amounts to 42.54 percent.[62] The record shows that Inmarsat is organized under English Company Law, pursuant to which a simple majority decides questions or issues arising at a meeting of shareholders, except for extraordinary matters such as amending the company's charter documents.[63] Accordingly, former Signatories lack the majority required to control Inmarsat under English Company Law, regardless of whether they act either together or individually.

16. Provisions of Inmarsat's corporate governance also support the conclusion that Apax Partners and Permira exercise effective control over Inmarsat. Under Inmarsat's Shareholders Agreement, Apax Partners and Permira must both give prior written consent before Inmarsat can undertake any of the following actions: (1) make any major disposal or acquisition in excess of £500,000;[64] (2) make any material change to the nature of Inmarsat's business;[65] (3) undertake any merger, consolidation, or restructuring;[66] (4) appoint or terminate any Inmarsat employee whose base salary exceed £100,000;[67] (5) amend, modify, or waive any finance documents;[68] (6) make any capital expenditure in excess of 5 million dollars;[69] (7) enter into any agreement outside of the ordinary and normal course of business;[70] (8) amend or surrender the terms of any Inmarsat material contract;[71] (9) enter into any partnership or joint venture arrangement;[72] (10) enter into any agreement restricting Inmarsat's freedom to do business;[73] and (11) create any encumbrance or guarantee of Inmarsat's assets or give any guarantee, indemnity, or security.[74] These provisions provide Apax Partners and Permira with the ability to block significant business decisions of Inmarsat. Apax Partners and Permira also have veto rights over six of the eight seats currently available on Inmarsat's board of directors, and the two funds can, by mutual consent, increase the size of the board and appoint additional directors.[75] In addition, Apax Partners and Permira

[62] *See* Request for Declaratory Ruling at 8 and Appendix B.

[63] *See* Request for Declaratory Ruling at 12.

[64] Shareholders Agreement, Schedule 6, Item 5.

[65] Shareholders Agreement, Schedule 6, Item 6.

[66] Shareholders Agreement, Schedule 6, Item 8.

[67] Shareholders Agreement, Schedule 6, Item 13.

[68] Shareholders Agreement, Schedule 6, Item 18.

[69] Shareholders Agreement, Schedule 6, Item 19.

[70] Shareholders Agreement, Schedule 6, Item 20.

[71] Shareholders Agreement, Schedule 6, Item 21.

[72] Shareholders Agreement, Schedule 6, Item 25.

[73] Shareholders Agreement, Schedule 6, Item 26.

[74] Shareholders Agreement, Schedule 6, Item 27.

[75] *See* Articles of Association, §§ 32, 37.5; Shareholders Agreement at Schedule 6, Item 11. *See also infra* para. 21.

each has the right to approve the appointment of any Inmarsat officer.[76] Taken together, these provisions indicate that ultimate control over Inmarsat's operations, policy, personnel, and financing rests with Apax Partners and Permira.

17. Nonetheless, MSV contends that former Signatories maintain effective control over Inmarsat.[77] MSV puts forward three theories to support this contention. First, MSV argues that the former Signatories retain a large collective ownership in Inmarsat that gives the former Signatories control of Inmarsat despite the lack of a majority of ownership interests.[78] Second, MSV asserts that the privatized Inmarsat is economically dependent on former Signatories as significant distributors of its service.[79] Finally, MSV points to provisions contained in the Inmarsat Articles of Association and Shareholders Agreement that MSV claims retain effective control of Inmarsat for former Signatories.[80] For the reasons discussed below, we find none of these arguments demonstrates that the former Signatories exert effective control over Inmarsat.

18. First, the retention of a 42.54% ownership in the privatized Inmarsat does not give the former Signatories control over Inmarsat, even if they act collectively as a block. Although MSV correctly notes that ownership interests of less than 40% can confer effective control of entities in other situations,[81] it is not the case here. Because the level of collective ownership interest retained by former Signatories falls short of the simple majority of the voting rights required to control Inmarsat, the former Signatories would have to be joined by either Apax Partners or Permira before a majority could be assembled.[82] By contrast, Apax Partners and Permira are capable of forming a majority without the participation of any former Signatories, or any other shareholders. Thus, the former Signatories lack negative control over Inmarsat.[83] MSV's argument that neither Apax Partner nor Permira can individually control Inmarsat is irrelevant to our review. The ORBIT Act does not require control of Inmarsat to be vested in a single entity; it simply requires that former Signatories not exercise such control, either together or individually. In the absence of any indication that Congress intended that control of Inmarsat be vested in a single entity, we will not read such a requirement into the Act.[84]

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[76] *See* Shareholders Agreement at Schedule 6, Item 11. *See also infra* para. 21, n.97.

[77] *See generally* Opposition of Mobile Satellite Ventures; Reply of Mobile Satellite Ventures.

[78] Opposition of Mobile Satellite Ventures at 8-9.

[79] Opposition of Mobile Satellite Ventures at 10-11.

[80] Opposition of Mobile Satellite Ventures at 11-15.

[81] Opposition of Mobile Satellite Ventures at 9, n.17.

[82] The record shows that the former Signatories would not be able to assemble a majority of the voting interests in Inmarsat even if they were to have the support of the approximately 5.7% of the voting interests of non-former Signatories that are not controlled by Apax Partners or Permira. *See* Request for Declaratory Ruling, Appendix B.

[83] "Negative control" is held by a person or entity that can block decisions affecting every aspect of licensee activity, but cannot compel action without the concurrence of another party. *See* Stephen F. Sewell, Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934, 43 Fed. Comm. L.J. 277, 304 (1991) (*"Sewell"*).

[84] We note that Section 621(2) permits Inmarsat to achieve independence through an initial public offering of stock in Section 621(5)(A), which could result in the stock of Inmarsat being widely held by a diverse group of (continued….)

19. Second, the fact that former Signatories that retain significant voting interests in Inmarsat, such as Telenor and KDDI, are significant distributors of Inmarsat services does not mean that these entities retain effective control over the company. The record contains no citation to any Commission or court decision to support the claim that being a major distributor of a company's service amounts to effective control over the company. In any event, MSV's argument is inconsistent with the provisions of the ORBIT Act. Under MSV's reasoning, even if a sole former Signatory retained one ownership share in the privatized Inmarsat, it would exert effective control over the company if it were also a significant distributor of Inmarsat's service. As a result, the privatized Inmarsat could escape effective control by former Signatories only if the former Signatories completely divest themselves of all ownership interests in Inmarsat, or if the former Signatories cease to be significant distributors of Inmarsat services. Given that the ORBIT Act clearly contemplates that former Signatories may retain some ownership interest in the privatized Inmarsat,[85] and that nothing in the ORBIT Act requires former Signatories to cease distribution of Inmarsat services, we decline to read such requirements into the Act.

20. Third, neither the terms of Inmarsat's Articles of Association nor the terms of its Shareholders Agreement support MSV's contention that the former Signatories retain effective control of Inmarsat.[86] For example, MSV identifies "supermajority" provisions in the Articles of Association and the Shareholders Agreement that it alleges provide former Signatories with effective control of Inmarsat.[87] These supermajority provisions require more than 50% of the voting stock to effectuate issuance of new shares of stock, to abrogate the rights of share classes, to allot any equity securities, or to modify the Shareholders Agreement.[88] These supermajority provisions, however, are commonplace provisions typically included to protect the rights of minority shareholders and do not amount to effective control of a company.[89] Another provision in the Articles of Association cited by MSV restricts Inmarsat

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shareholders with no single entity exercising control. *See* ORBIT Act, as amended, §§ 621(2) and 621(5)(A). These provisions indicate that Congress did not intend to require that control of Inmarsat be vested in a single entity when it drafted the ORBIT Act.

[85] *See* Sections 621(2) and 621(5)(F)(i)(I), which call for only "substantial dilution" of ownership interests of former Signatories, not the complete divestiture of all such interests. *See* ORBIT Act, as amended, §§ 621(2) and 621(5)(F)(i)(I).

[86] Opposition of Mobile Satellite Ventures at 12-15.

[87] Opposition of Mobile Satellite Ventures at 12.

[88] Opposition of Mobile Satellite Ventures at 12, n.23 (citing Articles of Association § 20.2, which requires approval of 75 percent of shareholders to issue new shares; Articles of Association § 19.1, which prohibits the abrogation of the rights of any share class without the approval of holders of 75% of its shares; and Articles of Association § 53.1, which prohibits amendment of Articles of Association without the approval of directors appointed by entities holding 10% or more of the shares) and at 14 (citing Shareholders Agreement § 16.3, which prohibits allotment of any equity securities without approval of 75 percent of the shareholders and the directors appointed by the 10 percent shareholders; Shareholders Agreement § 9.2, which prohibits modification of the Shareholders Agreement without approval of 75 percent of the shareholders).

[89] *See* Implementation of Section 309(j) of the Communications Act – Competitive Bidding, *Memorandum Opinion and Order*, 10 FCC Rcd 403, 447 (para. 81) (1994) (providing that "non-voting shareholders may be given a decision making role (through supermajority provisions or similar mechanisms) in major corporate decisions that affect their interest as shareholders without being deemed to be in de facto control."). *See also* News International, PLC, *Memorandum Opinion and Order*, 97 FCC2d 349, 358 (1984)) (*"News International"*); *Sewell*, 43 Fed. Comm. L.J. at 304, n.98 (noting that "minority shareholders who can block specified major (continued….)

from acquiring, or merging with, a Land Earth Station Operator ("LESO") without the assent of all 10% or greater shareholders, which includes the former Signatories, Telenor and COMSAT.[90] We agree with Inmarsat, however, that this restriction amounts to nothing more than a covenant on the part of Inmarsat not to compete with shareholders who engage in such operations.[91] The record shows that it is narrowly tailored to a particular line of business and is of a limited, two-year duration.[92] Commission precedent indicates that covenants not to compete are common provisions in mergers or acquisitions and do not, in themselves, amount to effective control of a company.[93] Likewise, the provision that prohibits Inmarsat from entering into contracts with Apax Partners or Permira without the approval of the directors appointed by Telenor and COMSAT appears to be a narrowly tailored restriction designed to prevent self-serving deals by the majority shareholders at the expense of minority shareholders. This provision does not give former Signatories effective control of the operations of Inmarsat.

21. We also reject MSV's argument that provisions regarding the composition and conduct of Inmarsat's board of directors, which are contained in the Articles of Association and Shareholders Agreement, grant former Signatories effective control of Inmarsat.[94] These provisions give Telenor and COMSAT each the right to appoint one director to the board and require the presence of at least one of the directors appointed by the former Signatories in order to constitute a quorum for directors to conduct business.[95] The record shows, however, that directors appointed by former Signatories will account for only 2 out of the 8 seats currently available on the board.[96] Apax Partners and Permira have veto rights over the remaining six board members, and the two funds can, by mutual consent, increase the size of the board and appoint any additional directors.[97] MSV is correct that neither Apax Partners nor Permira has any obligation to appoint directors unacceptable to former Signatories,[98] but that is not an indication of control by the former Signatories. Rather, the relevant point is that former Signatories are no longer able to appoint a majority of the board of directors, and, as a result, lack control over it. Although the required presence of a board member appointed by the former Signatories could indicate a form of negative control

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transactions, such as the sale of all or substantially all of the licensee's assets, or changes in the corporate charter affecting minority shareholders' rights, are not considered to possess negative control").

[90] Opposition of Mobile Satellite Ventures at 12, n.23 (citing Articles of Association, § 39). The term "LESO" is defined by the Articles of Association as "any company, partnership, or other entity that owns, controls or operates a land earth station or any Affiliate thereof… ." Articles of Association, § 1.

[91] Reply of Inmarsat Group Holdings Ltd. at 16.

[92] *See* Articles of Assocation at § 39.9.1 (providing for a "sunset" of the LESO provision in December 2006).

[93] *See, e.g.*, *News International,* 97 FCC 2d 349 at para. 20 (holding that a covenant not to compete reflects "reasonable business judgment" that "grants neither party control").

[94] Opposition of Mobile Satellite Ventures at 13.

[95] Opposition of Mobile Satellite Ventures at 13 (citing Articles of Association §§ 12 and 39.8).

[96] Reply of Inmarsat Group Holdings Ltd. at 10.

[97] *See* Articles of Association, §§ 32, 37.5; Shareholders Agreement at Schedule 6, Item 11. In addition, Apax Partners and Permira each has the right to approve the appointment of any Inmarsat officer. *See* Shareholders Agreement at Schedule 6, Item 11.

[98] Opposition of Mobile Satellite Ventures at 13.

over Inmarsat through the power to block business from being transacted, the record shows that in such an absence the board can be reconvened seven days later and that merely the two directors appointed by Apax Partners and Permira need to be present to constitute a quorum.[99] Thus, the former Signatories are not able to exercise negative control over Inmarsat through the absence of their appointed directors.

C. Section 621(5)(F)(i)(III): "Intergovernmental Organization Ownership"

22. The last of the three certifications set forth by the amendments to Section 621(5)(F) is a certification that "no intergovernmental organization has . . . more than a minimal ownership interest in a successor entity of Inmarsat."[100] Inmarsat has made this certification as part of the *December 16 Sukawaty Certification* that was attached to Inmarsat's Supplemental Submission.

23. In the *Inmarsat Market Access Order*, the Commission found that the International Mobile Satellite Organization ("IMSO") held only a minimal ownership interest in Inmarsat.[101] IMSO is a residual IGO created in 1999 to monitor Inmarsat's continued provision of certain "public services," principally those of the global maritime distress and safety system ("GMDSS").[102] The Commission found that the "special share" held by IMSO in the privatized Inmarsat constituted "minimal ownership" because it was restricted to allowing IMSO to veto certain actions that threatened the GMDSS and conferred neither rights to participate in the profits of the privatized Inmarsat nor any normal voting rights.[103] Based on the information provided by Inmarsat in its Supplemental Submission, we find that there has been no change in IMSO with respect to its ownership relationship with Inmarsat and that no other IGO has any ownership in Inmarsat.[104] Moreover, based on its review of distress alert data from the Distress Alert Quality Control System, Inmarsat has determined that GMDSS-related traffic on the Inmarsat system accounts for less than 1% of Inmarsat's total revenues for the twelve months ended October 31, 2004.[105] Because the record shows that GMDSS consists of only a small percentage of Inmarsat's overall business, the veto provision of IMSO's special share provides minimal ownership interests in Inmarsat. Accordingly, we find that Inmarsat complies with its Certification made pursuant to Section 621(5)(F)(i)(III) of the amended ORBIT Act.

24. Finally, we reject the contention that the "independence" requirement of Section 621(2) of the ORBIT Act requires a separate, and more searching, review than that provided pursuant to Section 621(5)(F) of the amended ORBIT Act.[106] MSV points to the text of Section 621(2), which states that "[the privatized Inmarsat] shall operate as independent commercial entities, and have a pro-competitive

[99] *See* Reply of Inmarsat Group Holdings at 3, n.5 (citing Articles of Association, § 39.8).

[100] ORBIT Act, as amended, § 621(5)(F)(i)(III).

[101] *Inmarsat Market Access Order*, 16 FCC Rcd at 21686 (para. 41).

[102] *Inmarsat Market Access Order*, 16 FCC Rcd at 21686 (para. 41).

[103] *Inmarsat Market Access Order*, 16 FCC Rcd at 21686 (para. 41).

[104] Supplemental Submission at 1.

[105] Supplemental Submission at 2.

[106] Opposition of Mobile Satellite Ventures at 5.

ownership structure."[107] MSV argues that, because this section of the ORBIT Act was not affected by the amendments made by Congress in October 2004, the Commission must evaluate the independence of Inmarsat from former Signatories "under the broader criteria of the Act," rather than just determining whether Inmarsat has complied with its certification pursuant to Section 621(5)(F).[108] As a result, MSV argues that the Commission must determine whether the privatized Inmarsat is "truly independent" of its former Signatories under Section 621(2) of the ORBIT Act, regardless of whether it finds that Inmarsat complies with the certification made under Section 621(5)(F).[109]

25. We agree that Section 621(2) remains an integral part of the Commission's evaluation of the privatization efforts of Inmarsat. We do not agree, however, that Section 621(2) requires a separate review from the certification procedures of Section 621(5)(F). Section 621(2) plainly states that the independence of the privatized Inmarsat is to be achieved by the conduct of an initial public offering in accordance with Section 621(5).[110] Congress amended Section 621(5) of the ORBIT Act to permit Inmarsat to substitute a certification procedure in lieu of an initial public offering. As a result, Congress permitted the independence requirement of Section 621(2) to be satisfied not only through the conduct of an initial public offering, but also through the certification procedure provided by Section 621(5)(F) of the amended Act. As a result, if Inmarsat satisfies the certification provisions of Section 621(5)(F), it also satisfies the independence requirement of Section 621(2). Accordingly, there is no need for a separate review under Section 621(2) once it is determined that the privatized Inmarsat meets the certification criteria of Section 621(5)(F).

IV. CONCLUSION

26. Based on the above, we conclude that Inmarsat has complied with Section 621(5)(F) of the ORBIT Act, and as such, may forego an IPO and public securities listing as required under Section 621(5)(A) and (B).[111] Thus, we remove from Inmarsat's authority to serve the U.S. market the condition that requires Inmarsat to conduct an IPO under Sections 621(2) and 621(5)(A) of the ORBIT Act.[112] We also remove from Inmarsat's authority the condition that subjects Inmarsat's authorization for non-core services to limitation or revocation should Inmarsat fail to conduct an IPO in compliance with Section 621 of the ORBIT Act.[113] Further, given our findings in this Order, along with our previous findings in the *Inmarsat Market Access Order* that Inmarsat's privatization is consistent with the non-IPO provisions of ORBIT Act,[114] we find that Inmarsat has met the criteria set forth under Sections 621 and 622 of the ORBIT Act for the purpose of satisfying the Certification requirement. Consequently, we find that

[107] Opposition of Mobile Satellite Ventures at 5.

[108] Opposition of Mobile Satellite Ventures at 5.

[109] Opposition of Mobile Satellite Ventures at 5.

[110] ORBIT Act, § 621(2) ("The successor entities and separated entities of INTELSAT and Inmarsat shall conduct an initial public offering in accordance with paragraph (5) to achieve such independence.")

[111] ORBIT Act, as amended, § 621(5)(F).

[112] *Inmarsat Market Access Order*, 16 FCC Rcd at 21712 (para 110).

[113] *Inmarsat Market Access Order*, 16 FCC Rcd at 21712 (para 112)

[114] *Inmarsat Market Access Order*, 16 FCC Rcd at 21686-91 (paras. 39-51).

Section 602, which prohibits Inmarsat from providing additional services and requires the United States to decline and oppose new orbital locations for provision of such services until Inmarsat meets the privatization requirements of the ORBIT Act, is no longer applicable.[115]

V. ORDERING CLAUSES

27. Accordingly, it is DETERMINED THAT the Certification of Inmarsat Group Holdings Ltd. ("Inmarsat") COMPLIES WITH Section 621(5)(F) and (G) of the Open-Market Reorganization for the Betterment of International Communications Act, as amended. ORBIT Act §§ 621(5)(F) and 621(5)(G), and Inmarsat's Request for Declaratory Ruling, filed November 15, 2004, IS GRANTED.

28. It is FURTHER DETERMINED THAT by this action, and consistent with the provisions of the Open-Market Reorganization for the Betterment of International Communications Act, as amended, Inmarsat may forgo the requirement that it hold an initial public offering of securities as set forth in Sections 621(2) and 621(5)(A) and a public listing of securities as set forth in Section 621(5)(B). ORBIT Act §§ 621(2), 621(5)(A), 621(5)(B), 621(5)(F), and 621(5)(G).

29. It is FURTHER DETERMINED THAT by this action, and consistent with the provisions of the Open-Market Reorganization for the Betterment of International Communications Act, as amended, Inmarsat IS NO LONGER SUBJECT TO the provisions under Section 602, which prohibited Inmarsat from providing additional services and required the United States to oppose and decline to facilitate applications for new orbital locations to provide such services. ORBIT Act §§ 602(a), 602(b).

30. It is FURTHER DETERMINED THAT by this action, and consistent with the provisions of the Open-Market Reorganization for the Betterment of International Communications Act, as amended, the condition on Inmarsat's authorization that subjects its authority to serve the U.S. market to a future Commission finding that Inmarsat has conducted an IPO under Sections 621(2) and 621(5)(A)(ii) of the ORBIT Act, IS HEREBY REMOVED.

31. It is FURTHER DETERMINED THAT by this action, and consistent with the provisions of the Open-Market Reorganization for the Betterment of International Communications Act, as amended, the condition on Inmarsat's authorization that subjects Inmarsat's authorization for non-core services to limitation or revocation should Inmarsat fail to conduct an IPO in compliance with Section 621 of the ORBIT Act, IS HEREBY REMOVED. ORBIT Act §§ 601(b)(1)(A), 681(a)(11).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[115] ORBIT Act, §§ 602(a) and (b).

APPENDIX

List of Parties Filing Pleadings in IB Docket No. 04-439:

Comments:

Mobile Satellite Ventures Subsidiary LLC ("Opposition of Mobile Satellite Ventures")
Lockheed Martin Corporation

Replies to Comments:

Inmarsat Group Holdings Ltd. ("Reply of Inmarsat Group Holdings")
Iridium Satellite LLC
Lockheed Martin
Mobile Satellite Ventures Subsidiary LLC ("Reply of Mobile Satellite Ventures")

List of Parties Filing Pleadings in File No. SAT-MSC-20040210-00027

Comments:

Mobile Satellite Ventures Subsidiary LLC
SES Americom, Inc.
Stratos Mobile Networks, Inc.

Responses:

Deere & Company
Inmarsat Group Holdings Ltd.
Stratos Mobile Networks, Inc.
Telenor Satellite Services, Inc.

Replies:
Mobile Satellite Ventures Subsidiary LLC
SES Americom, Inc.